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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANNA ELIZABETH RICHEY, Defendant and Appellant.	E052051 (Super.Ct.No. RIF152902) O P I N I O N

APPEAL from the Superior Court of Riverside County. Sherrill A. Ellsworth, Judge. Affirmed in part and reversed in part with directions.

Victoria Barana and Beatrice Tillman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Following a jury trial, defendant Anna Elizabeth Richey was found guilty of felony child abuse (Pen. Code, § 273a, subd. (a); count 1),[1] battery (§ 242; count 2), and assault (§ 240; count 3). She was sentenced to 240 days in jail followed by 48 months of formal probation; court fees and a $2,400 restitution fine were also imposed.

On this appeal, defendant claims her felony child abuse conviction in count 1 must be reversed because the jury inconsistently found her not guilty of the lesser offense of misdemeanor child abuse (§ 273a, subd. (b)) in the same count. We reject this claim. As we explain, the jury unambiguously found defendant guilty of felony child abuse in count 1. Thus her felony conviction must stand.

Defendant also seeks reversal of her assault conviction in count 3. At the time of trial, defendant was charged in two counts, not three. In count 2 she was charged with felony infliction of an injury resulting in a traumatic condition upon a child. (§ 273d, subd. (a).) In this count, the jury was instructed on the lesser included offenses of assault (§ 240) and battery (§ 242). The jury found her not guilty of the charged crime but guilty of *both* lesser included offenses. At sentencing, the court divided these guilty verdicts into separate counts, making the battery conviction count 2 and the assault conviction a newly added count 3. Defendant argues the jury could have properly convicted her of either lesser included offense, but not both, because assault is itself a lesser included offense of battery. We agree and reverse defendant's assault conviction in count 3.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Defendant further argues that if her assault conviction is reversed, then the court fees associated with the assault conviction must also be reversed or stricken. We agree. We therefore vacate the $30 court security fee (Pen. Code, § 1465.8) and the $30 criminal conviction assessment fee (Gov. Code, § 70373) imposed on count 3. We also remand the matter to the trial court with directions to reconsider the $2,400 restitution fine in light of our reversal of the assault conviction, because it is unclear from the record whether and if so to what extent the restitution fine was based on the assault conviction.

Finally, defendant challenges three conditions of her probation. She argues that a condition requiring her to submit to an immediate search of her person or property upon request by the probation officer or any law enforcement officer must be stricken because it is unconstitutionally overbroad. Alternatively, she argues that this condition must be stricken because it fails to meet the requirements for probation conditions as set forth in *People v. Lent* (1975) 15 Cal.3d 481. She also claims that the probation conditions requiring her to submit to alcohol testing, and requiring her to pay the costs of such testing, fail to meet the requirements set forth in *Lent*. We do not address the merits of these claims because we find that defendant forfeited her right to challenge these conditions on appeal.

II. FACTUAL SUMMARY

Defendant and Sarah S. first met in early 2006. Sarah was pregnant and renting a bedroom in the basement of her sister Shannon's home in Moreno Valley. Sarah and defendant began dating, and after Sarah gave birth to her son Z.S., defendant moved into

the basement bedroom with them. The couple lived in Shannon's basement for about four months, then found their own apartment in Riverside. Over the next two years the couple lived on their own with Z.S. They moved to two different apartments in Riverside before they encountered financial difficulties and had to return to living in Shannon's basement.

A few months after moving back into Shannon's basement, Sarah reconnected with some old friends, Lynda and Peter Matz. Shortly thereafter, Sarah, defendant, and Z.S. began visiting the Matzes' home on a daily basis. An informal day care arrangement was made with the Matzes, and Z.S. would often be left in their care for several hours a day before Sarah or defendant would pick him up.

One evening, near the end of June 2009, defendant and Z.S. were in the Matzes' living room, and Lynda saw defendant hit Z.S. while trying to get him to go to sleep. It was late at night, and Z.S. would not lie still, so defendant yelled at him and used the side of her fist to hit him in the middle of his back. Lynda told defendant that Z.S. might be moving around because he was hot and covered in blankets, but Lynda did not confront defendant about hitting Z.S., nor did she believe that Z.S. had been hit hard enough to leave any type of a bruise or mark.

On July 4, 2009, defendant took Z.S. with her to attend a small party at the Matzes' home. At some point, Z.S. had an accident in his pants and defendant took him to the bathroom to clean up. While they were in there, Lynda heard a loud noise as if something had fallen, and noticed that when Z.S. left the bathroom, he had a bruised left

eye. When Lynda asked defendant what happened, defendant explained that Z.S. had accidentally fallen from the toilet and hit his head on the bathtub.

Sarah later asked defendant about Z.S.'s eye and was told he received the injury from falling down, or by getting pushed over by a dog, or that it happened at day care. Defendant did not tell Sarah that Z.S. had fallen from a toilet. Lynda told Sarah the version of events that defendant had told her. Sarah believed defendant's explanations and did not have any concerns with continuing to leave Z.S. in defendant's care.

Around July 11, 2009, the Matzes took their children and Z.S. with them as they ran some errands. By this time, Z.S.'s left eye was healing from the week before, and the bruising had faded to a lighter yellowish color. When the Matzes returned, they found defendant waiting for them outside their home. Defendant came over to their car, and as she removed Z.S. from his carseat she began to yell at him after discovering he had yet another accident. Again, defendant took Z.S. to the bathroom to clean up, and though Lynda did not hear any loud noises on this occasion, she noticed that Z.S. left the bathroom crying and that the bruising under his left eye appeared much darker. When she asked about how the darker bruising had returned, defendant told her "it just came back."

Shortly after the July 11 incident, defendant lost her job. As a result, she largely assumed the caretaking responsibilities for Z.S. while Sarah was at work. Instead of taking Z.S. to the Matzes' home, defendant cared for him at Shannon's home. The Matzes had only periodic contact with Z.S. after defendant lost her job.

On the evening of August 13, 2009, Sarah got a flat tire on the highway and called defendant for help. As defendant was leaving the house to meet Sarah, she was approached by Sarah's older brother, Andrew. Defendant did not get along with Andrew, and because she was on her way to meet with Sarah she hurried outside to her car with Z.S.

Andrew was concerned because, as defendant was carrying Z.S. outside, Z.S. lifted his head to look at Andrew, and Andrew noticed that Z.S. had a black eye. Andrew followed defendant to her car, confronted her, reached through the car window and slapped her in her face. Defendant avoided any further confrontation by driving away from the situation as quickly as possible.

When defendant met with Sarah, she told her about the incident with Andrew. Sarah decided to report the incident to the police and an officer arrived to take a statement. The officer spent about 15 to 20 minutes speaking with the couple, and left for another call when it was determined that defendant did not want to press criminal charges. During the meeting, the officer noticed bruises under Z.S.'s eyes, and when the officer asked about the bruises, defendant told her that Z.S. received them from being knocked down by a dog. The officer did not notice any other bruising on Z.S. and did not believe there was any evidence to indicate that Z.S. had been abused.

Later that same day, Shannon placed an emergency call seeking police assistance in evicting defendant from her home. In this telephone call, Shannon told the police that

she believed defendant was abusing Z.S. The officer that responded to Shannon's call was the same officer that had just met with defendant.

When the officer arrived at Shannon's home, Sarah was outside in the driveway but neither defendant nor Z.S. were home. The officer asked Sarah to contact defendant and have her bring Z.S. to the house. When they arrived, the officer discovered that in addition to his black eye, Z.S. had extensive bruising on his back and buttocks. Child Protective Services was contacted and Z.S. was taken to the hospital for further examination.

A physical examination revealed that Z.S. had suffered multiple injuries, including bruising, scratches, fingernail markings, a boggy scalp, and a torn frenulum.[2] In the opinion of Dr. Claire Sheridan, these injuries were inflicted and nonaccidental. Z.S. was removed from Sarah's custody. Sarah then terminated her relationship with defendant and these criminal charges were ultimately filed.

III. DISCUSSION

A. *Inconsistent Verdicts in Count 1*

Defendant claims her felony child abuse conviction in count 1 (§ 273a, subd. (a)) must be reversed because the record does not establish the jury's unequivocal intent to convict her of the crime. The jury was instructed on felony child abuse and misdemeanor child abuse as a lesser included offense. In separate verdict forms, the jury found

[2] The torn frenulum in this context referred to the small flap of tissue inside the mouth, connecting the center of the upper lip to the center of the upper gum.

defendant guilty of the charged offense but not guilty of the lesser offense. Defendant claims the verdicts are inconsistent and create an ambiguity concerning the jury's intent to convict her of the greater crime.

In support of her claim, defendant relies primarily on *People v. Soto* (1985) 166 Cal.App.3d 428, 431-432 (*Soto*). There the jury returned one verdict finding the defendant not guilty of murder, and a second verdict fixing the degree of the murder as second degree. (*Id*. at p. 432.) The verdict fixing the degree of the murder did not indicate the defendant was guilty of murder or second degree murder. The verdicts were read aloud in court and collectively affirmed by the jury. (*Ibid*.) The court and counsel engaged in a colloquy, confirming their understanding that the defendant had just been convicted of second degree murder. (*Id*. at pp. 432-433 & fn. 3.) Individual polling of the jury was waived, and the jury was discharged. (*Id.* at pp. 432-433.) The next day the court, recognizing the ambiguity in the jury's verdicts, ordered the jury reimpaneled. (*Id*. at p. 433.) The jury then returned a verdict explicitly finding the defendant guilty of second degree murder. (*Ibid.*)

The *Soto* court reversed the second degree murder conviction. (*Soto, supra,* 166 Cal.App.3d at p. 442.) The court first determined that the trial court lacked the power or authority to reimpanel the jury once it had been released, and as a result the original verdict forms had to be examined "'as though there had been no attempt to revive the defunct jury, or to change the . . . verdict.' [Citations.]" (*Id.* at p. 435.) After reviewing

the verdicts, the court found they could not be construed as finding the defendant guilty of second degree murder. (*Id*. at p. 438.)

In reaching this conclusion, the *Soto* court focused on section 1162, which states: "[N]o judgment of conviction can be given unless the jury expressly finds against the defendant upon the issue . . . ." This language was interpreted in *People v. Tilley* (1901) 135 Cal. 61, as meaning that the form of a verdict may be regarded as immaterial if "'the intention to convict [the defendant] of the crime charged [has been] *unmistakably expressed.*'" (*People v. Soto, supra,* 166 Cal.App.3d at p. 437.) "'[T]here is no room for inference *outside the words of the verdict*. These must express the intention unequivocally; otherwise, the verdict must be regarded as insufficient.' [Citations.]" (*Ibid., citing People v. Tilley, supra,* at pp. 62-63.) Looking solely to the words of the first verdict, the *Soto* court concluded that the jury expressly found the defendant *not guilty* of murder and *did not* expressly find him guilty of second degree murder. (*People v. Soto, supra,* at p. 438.) And because the first verdict contained no express finding of guilt, the court concluded that any attempt to interpret the verdict as one of conviction would be "contrary to the defendant's right to an unequivocal verdict on the question of his guilt." (*Ibid.*)

Unlike the verdict in *Soto*, here the verdict finding defendant guilty of the charged offense of felony child abuse explicitly states the offense for which the jury found defendant guilty. Because there is no room for inference outside the words of the verdict (*Soto, supra,* 166 Cal.App.3d at p. 437), we may not look to the language of a separate

verdict for the purpose of creating an ambiguity. The jury collectively affirmed the guilty verdict as correctly expressing their finding, and defendant waived her right to have the jury individually polled. On these facts, there has been no violation of defendant's right to an unequivocal verdict on the issue of her guilt of felony child abuse in count 1.

In our justice system, "'the internal operations of a jury are rarely subject to scrutiny . . . .' [Citation.]" (*People v. Guerra* (2009) 176 Cal.App.4th 933, 942.) "Sometimes, of course, this system frays, as in the case of the inconsistent verdicts . . . ." (*Id.* at p. 943.) When confronted by inconsistent verdicts, courts have offered a number of explanations for the jury's actions, the most common being that the verdicts are the product of mistake, leniency or compromise. (*United States v. Powell* (1984) 469 U.S. 57, 65; *Dunn v. United States* (1932) 284 U.S. 390, 393-394; *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 13; *People v. Avila* (2006) 38 Cal.4th 491, 600; *People v. Lewis* (2001) 25 Cal.4th 610, 656.) Although it is unnecessary to speculate why the jury inconsistently found defendant not guilty of the lesser included offense of misdemeanor child abuse (§ 273a, subd. (b)), we believe defendant's conviction of the greater offense of felony child abuse falls within the line of cases where inconsistent verdicts have been viewed as the product of mistake.

People v. Davis (1988) 202 Cal.App.3d 1009 (*Davis*) is closely analogous to the present case. There the defendant appealed a conviction for second degree murder. The jurors were instructed on first degree premeditated murder, second degree murder, voluntary manslaughter, and involuntary manslaughter. (*Id.* at p. 1014.) They were

further instructed that they were to consider the verdicts in decreasing order of severity until they "had agreed on a verdict of guilty at some level, deadlocked at some level, or agreed on a verdict of not guilty at all levels. [¶] In violation of the instruction, the jury returned verdicts of not guilty of first degree murder, guilty of second degree murder, not guilty of voluntary manslaughter, and not guilty of involuntary manslaughter. . . . The jury was polled and all members agreed that guilty of second degree murder was their verdict. The verdict was then recorded in the court minutes." (*Ibid.*)

On appeal, the court rejected a claim that the defendant's second degree murder conviction had to be reversed because the verdicts on the lesser included offenses were inherently inconsistent. (*Davis, supra,* 202 Cal.App.3d at p. 1016.) The court referred to the inconsistency as a technical or procedural error that resulted from the jury's failure to follow the court's instructions. (*Id.* at p. 1017.) The court held that the judgment could not be set aside, unless, in view of the whole record there had been a miscarriage of justice. (*Ibid.,* citing Cal. Const., art. VI, § 13.) The court treated the verdicts for voluntary manslaughter and involuntary manslaughter as superfluous, finding there was no miscarriage of justice because the jury clearly intended to convict the defendant of second degree murder. (*Davis, supra,* at p. 1017.) Likewise, the jury's verdict finding defendant not guilty of misdemeanor child abuse is superfluous, because the jury clearly intended to convict defendant of felony child abuse, as indicated by its verdict finding defendant guilty of that offense.

People v. Caird (1998) 63 Cal.App.4th 578 is also instructive. There the defendant was charged with forcible lewd acts on a child. The jury was instructed on this offense and on the lesser included offense of nonforcible lewd acts on a child. (*Id.* at pp. 585-586.) The jury returned verdicts of guilty for the greater crime and not guilty of the lesser included offense. (*Id.* at p. 586.) The trial court spotted the inconsistency and allowed the jury to reconsider the verdicts in order to determine whether it had merely made a technical mistake. When the jury returned, it again provided the court with inconsistent verdicts. The court then polled each juror and concluded the jury had not found the defendant guilty of the lesser included offense but had found him guilty of the greater crime. (*Ibid.*)

On appeal, the court rejected the defendant's claims that the jury's not guilty verdict on the lesser included offense constituted an acquittal, which, under section 1161, would preclude the trial court from allowing the jury to reconsider the verdict. (*People v. Caird, supra,* 63 Cal.App.4th at pp. 586-588.) The court found the reasoning of *Davis* persuasive, concluding that the jury mistakenly believed they were supposed to complete all the verdict forms. (*People v. Caird, supra,* at p. 589.) This mistaken belief caused the juries in both cases to make superfluous not guilty findings on lesser offenses that were insufficient to warrant reversal.

Here, the jury's not guilty verdict on the lesser included offense of misdemeanor child abuse in count 1 is also the product of a procedural or technical error. The jury was instructed pursuant to CALCRIM No. 3517 on the procedure for completing and

returning jury verdicts where lesser included offenses are not separately charged. As part of this instruction, the jury was told: "If all of you agree the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form for that count." In violation of this instruction, the jury returned verdicts of guilty of the greater crime and not guilty of the lesser included offense.

The jury's actions here may be explained following the same logic applied in *Caird* and *Davis*. The jury was instructed on a total of five separate offenses for which they could find defendant guilty or not guilty, consisting of the charged offenses in counts 1 and 2, one lesser offense in count 1, and two lesser offenses in count 2. The court received five signed and completed verdict forms from the jury. The jury made an express finding for each and every offense for which it had been instructed and, by following this procedure, made a superfluous finding on the lesser included offense of misdemeanor child abuse in count 1. It was not that the jury found defendant not guilty of the lesser included offense, rather, the jury found her guilty of the greater crime. The jury forgot that once they determined defendant was guilty of the greater crime in count 1, its task was complete and it was not to complete or sign the verdict form for the lesser included offense. The superfluous not guilty finding on the lesser included offense has not resulted in a miscarriage of justice because it was the jury's clear intent to convict defendant of the greater crime. (*Davis, supra,* 202 Cal.App.3d at p. 1017.)

Davis provides an additional reason for not disturbing the jury's unequivocal guilty verdict in count 1. The court noted that "[s]ection 954 provides that a verdict of acquittal of one count shall not be deemed to be an acquittal of any other count. Therefore, a verdict of conviction on one count which appears inconsistent with a verdict of acquittal on another count affords no basis for a reversal where the evidence is sufficient to support the conclusion that the defendant is guilty of the offense of which he stands convicted. [Citation.]" (*Davis, supra,* 202 Cal.App.3d at p. 1016.) Like the present case, *Davis* involved inconsistent verdicts on the same count, not inconsistent verdicts on separate counts as contemplated under section 954. (*Davis, supra,* at p. 1016.) *Davis* nonetheless recognized that when the jury is instructed on different crimes in a single count for which the defendant may be found guilty or not guilty, "the case is logically indistinguishable from a case in which a greater offense and a lesser included offense are charged in separate counts. [Citation.]" (*Ibid.*) Whether a not guilty verdict on a lesser included offense is treated as superfluous and therefore unnecessary and technically incorrect, or as a valid verdict to which the court is to give effect despite its inconsistency with another verdict, the result is the same: the not guilty verdict on the lesser included offense has no effect on the guilty verdict for the greater crime, so long as there is sufficient evidence to support the conviction. (*Ibid.*)

Here, defendant does not challenge the sufficiency of the evidence supporting her felony child abuse conviction, and there is no defect in the verdict form supporting the conviction. We therefore affirm the conviction.

B. *Defendant's Assault Conviction in Count 3 Must Be Reversed, and All Fees and Fines Associated With Her Assault Conviction Must Be Stricken*

1. The Assault Conviction

Defendant was originally charged in two separate counts. In count 2, she was charged with felony infliction of an injury resulting in a traumatic condition upon a child. (§ 273d, subd. (a).) The jury was instructed on the crimes of assault (§ 240) and battery (§ 242) as lesser included offenses. The jury found defendant not guilty of the crime charged, but found her guilty of both assault and battery.

At the sentencing hearing, no objections were raised to the convictions in count 2. The court treated the convictions as separate counts, making battery count 2, and assault the newly added count 3. On both convictions defendant was assessed a court security fee of $30 (Pen. Code, § 1465.8) and a criminal conviction assessment fee of $30 (Gov. Code, § 70373). Based on all of defendant's convictions, a restitution fine of $2,400 was imposed. (Pen. Code, § 1202.4, subd. (b).)

Defendant argues that her assault conviction in count 3 must be reversed, along with all of the monetary orders associated with the conviction, including the restitution fine. She argues that, within count 2, the crimes of battery and assault were both lesser included offenses of the charged offense, and she could not be convicted of both lesser included offenses because assault is itself a lesser included offense of battery. The People concede this point and present no objection to reversal of the assault conviction. The People have also implicitly conceded defendant's point for reversing all monetary

orders associated with this conviction, because they have failed to address the issue in their brief. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480.)

In California, the general rule is that "a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226; §§ 654, 954.) However, a judicially created exception to this rule prohibits multiple convictions when based on necessarily included offenses. (*People v. Reed, supra,* at p. 1227.) Thus, defendant could not be convicted of both assault and battery, since assault is a necessarily included offense of battery. (*People v. Colantuono* (1994) 7 Cal.4th 206, 216-217.)

When, as here, a jury expressly finds the defendant guilty of both a greater and lesser included offense, the conviction for the greater offense is controlling, and the lesser included offense must be reversed. (*People v. Moran* (1970) 1 Cal.3d 755, 763.) Thus, defendant's conviction for battery is controlling, and her conviction for the lesser included offense of assault must be reversed.

2. The Resulting Fines

In count 2 and in newly added count 3, defendant was assessed two $30 fines, one pursuant to Penal Code section 1465.8 and another pursuant to Government Code section 70373. Under each statute, the court is required to impose a $30 fee "on every conviction for a criminal offense." Because we reverse the assault conviction, defendant is entitled to reversal of both of the $30 fines imposed on her assault conviction, or $60 in total fines. Defendant was further ordered to pay restitution in the amount of $2,400 pursuant

to Penal Code section 1202.4, subdivision (b). Under this statute, the court is required to impose a restitution fine "[i]n every case where a person is convicted of a crime . . . unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (Pen. Code, § 1202.4, subd. (b).) Unlike the fixed mandatory fines imposed under Penal Code section 1465.8 and Government Code section 70373, where a restitution fine is to be ordered, Penal Code section 1202.4, subdivision (b) provides only a range for the amount of the ultimate fine to be imposed.

As one acceptable way to calculate the amount of the restitution fine where the defendant is convicted of a felony, the statute provides a formula. (§ 1202.4, subd. (b)(2).) Specifically, "the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (*Ibid.*)

The trial court here did not indicate how it calculated the $2,400 fine, and defendant suggests the fine could be the result of misapplying the formula. Defendant explains that by multiplying $200 by the number of years of defendant's probation (four), and multiplying that number by the number of convictions (three), the amount of the fine to be imposed was $2,400. Defendant points out that this would be an incorrect application of the formula since the formula explicitly calls for multiplication by the number of *felony* counts of which defendant was convicted, and two of defendant's three convictions were misdemeanors.

Defendant is correct that this would be an improper application of the formula. The formula does not permit consideration of all convictions, only felony convictions. Use of the formula as indicated would also suffer from the additional defect of substituting the number of years of probation for the number of years of imprisonment ordered to be served. Because defendant was not ordered to serve any term of imprisonment, this would introduce a value of zero into the formula, and under the zero product of multiplication, any resulting outcome of the formula would necessarily be zero.

The trial court was not, however, required to apply the formula. The language of the statute is permissive, not mandatory. (§ 1202.4, subd. (b); *People v. Urbano* (2005) 128 Cal.App.4th 396, 405-406.) Specifically, the fine may be imposed "at the discretion of the court and commensurate with the seriousness of the offense," and the court is not required to state on the record its reasons for determining the amount of the fine. (*People v. Urbano, supra,* at p. 405.) The statute vests the court with broad discretion to consider any relevant factors in setting the amount of the fine, guided only by the requirement that the fine be commensurate with the seriousness of the offense, and sets a minimum and maximum fine based on whether the defendant is convicted of a misdemeanor or a felony. (§ 1202.4, subds. (b), (d); *People v. Urbano, supra,* at p. 405.)

Because defendant had a felony conviction, a restitution fine of between $200 and $10,000 was to be ordered. (§ 1202.4, subd. (b)(1).) It is clear that the $2,400 fine falls within an acceptable range under the statute. The court made no express findings on how

it reached this figure, nor was it required to make such findings. (§ 1202.4, subd. (d); *People v. Urbano, supra,* 128 Cal.App.4th at p. 405.) The problem is that it is unclear to what extent the now reversed assault conviction played in the court's calculation of the $2,400 fine. We therefore find it appropriate to reverse the fine and remand the matter to the trial court with directions to recalculate the fine in light of the reversal of defendant's assault conviction.

C. *Defendant Has Forfeited Her Challenge to Her Conditions of Probation*

Defendant requests that three conditions of her probation be stricken. The challenged conditions require defendant to: (1) submit to the immediate search of her person, automobile, residence and surrounding premises, garage, storage areas, and personal property or leased property, with or without reasonable cause, by the probation officer, or any law enforcement officer; (2) submit to any chemical tests of blood, breath, urine, or saliva, or combination thereof, and to any reasonable physical tests, upon requests of the probation officer or any law enforcement officer for the detection of controlled substances and alcohol; and (3) pay the actual costs of court-ordered testing.

Defendant argues that these conditions must be stricken because they bear no relationship to the crimes for which she stands convicted, do not prohibit otherwise criminal conduct, and are not related to any potential future criminality. With respect to the search condition, defendant advances the additional argument that the condition must be stricken as unconstitutionally overbroad.

The People argue that defendant has forfeited any right to challenge the probation conditions on appeal because she did not object to the conditions at the sentencing hearing. Defendant acknowledges that no objection was made to these conditions at the sentencing hearing, but argues that the need for objection was excused because the court's response to defendant's initial objection, indicating that each and every one of the suggested conditions of probation would be followed, showed that further objections to the probation conditions would prove futile. Additionally, defendant maintains that there is no forfeiture with respect to her challenge on grounds of overbreadth because the rule of forfeiture does not apply to pure questions of law capable of being resolved without reference to the sentencing record developed in the court.

1. The Rule of Forfeiture

In *People v. Welch* (1993) 5 Cal.4th 228, the defendant was convicted of welfare fraud and sentenced to 90 days in jail followed by five years' probation. (*Id.* at pp. 231-232.) At the sentencing hearing, the defendant sought placement in an alcohol treatment program in lieu of jail time, and the probation report was challenged as containing numerous factual inaccuracies. (*Id.* at p. 232.) Other than this, no further objections were made. (*Ibid.*) Defendant later appealed, challenging several of the probation conditions for failing to conform to the requirements set forth in *People v. Lent*, *supra*, 15 Cal.3d 481. (*People v. Welch*, *supra*, at p. 232.) The appellate court held that the defendant forfeited any challenge to the conditions because she failed to preserve that

right by making an objection at the sentencing hearing. (*Ibid.*) The issue was then appealed to the California Supreme Court.

The *Welch* court acknowledged that the great weight of case law in existence at the time indicated that no objection to probation conditions was necessary at the trial court in order for those conditions to be challenged on appeal. (*People v. Welch, supra,* 5 Cal.4th at pp. 232-233.) Nonetheless, the court confirmed that the correct rule was the one stated in the appellate court. (*Id.* at p. 233.) The court held that just as "failure to object and make an offer of proof at the sentencing hearing concerning alleged errors or omissions in the probation report waives the claim on appeal," "[n]o different rule should . . . apply to probation conditions under consideration at the same time." (*Id.* at pp. 234-235, fn. omitted.) The requirement of "timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case," and "[a] rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis." (*Id.* at p. 235.)

The court explained that the timely objection rule was not absolute, and proper circumstances might permit deviation from the rule, such as when an objection would prove futile or wholly unsupported by substantive law then in existence. (*People v. Welch, supra,* 5 Cal.4th at p. 237.) Consistent with these findings, the court held that the rule could not be used in connection with the defendant's claim because there was overwhelming case law indicating that no objection was necessary. (*Ibid.*)

Since then, our state Supreme Court has emphasized that even though the forfeiture rule is not automatic, an "appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.]" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "Applying the rule to appellate claims involving discretionary sentencing choices or unreasonable probation conditions is appropriate, because characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option or probation condition that is premised upon the facts and circumstances of the individual case." (*In re Sheena K.* (2007) 40 Cal.4th 875, 885.)

2. Pure Questions of Law

Defendant claims there has been no forfeiture of her right to challenge the probation condition requiring her to submit to warrantless searches of her person and property because the challenge involves a pure question of law capable of being resolved without reference to the particular sentencing record developed at the trial court. Defendant then argues that the search condition is unconstitutionally overbroad "because it allows warrantless searches of appellant's property for any reason, not just for purposes reasonably related to her crime or to potential future criminality."

This argument merely recasts defendant's claims that the probation condition is unreasonable. While posed as a facial challenge to the constitutionality of the condition, requiring no reference to the record below, the argument relies on the particular facts of defendant's conviction. Defendant does not suggest that this term could not be imposed

on anyone under any circumstances such that the term is per se unconstitutional, but instead argues that "as applied here, the search condition is unconstitutionally overbroad."

Not all constitutional defects in conditions of probation may be raised for the first time on appeal. (*In re Sheena K, supra,* 40 Cal.4th at p. 889.) Probation conditions that do not present a pure question of law do not fall within the exception to traditional principles of forfeiture. (*Ibid.*) For the exception to apply, an appellate court must only concern itself with abstract and generalized legal concepts and not with the individual facts and circumstances of the case. (*Id.* at p. 885.)

Defendant does not ask this court to consider this condition in the abstract. Instead, she invites us to review this probation condition as it relates to the nature of her particular conviction and her own future criminality. This would require us to look past the law as it relates to this condition and give consideration to the reasonableness of this condition in light of the particular facts of defendant's case. There can be no exception to the rule of forfeiture under these circumstances, and we decline to review the challenged terms of probation on this basis.

3. Futility of Making Objections

Defendant compares her case to *In re Antonio C.* (2000) 83 Cal.App.4th 1029 (*Antonio C.*), arguing that statements by the trial court demonstrate that further objections would have been futile. Here, as in *Antonio C.*, she argues that the requirement of timely objection must be excused.

In *Antonio C.*, the defendant made an objection to a condition of probation regarding gang affiliation. (*Antonio C., supra,* 83 Cal.App.4th at p. 1033.) In response, the court offered no explanation in overruling the objection, except to state: "'Are you through?'" (*Ibid.*) Defendant then appealed the imposition of a different probation condition for which no objection had been raised. (*Ibid.*)

On appeal, it was argued and the People conceded that an objection to the condition now being challenged would have been futile based on the trial court's rejection, without explanation, to the gang affiliation conditions. (*Antonio C., supra,* 83 Cal.App.4th at p. 1033.) The appellate court excused the timely objection requirement on this basis and reviewed the merits of the defendant's challenge to the probation condition. (*Ibid.*)

Defendant contends that here, as in *Antonio C.*, the trial court made statements indicating it was not receptive to objections to any of defendant's probation conditions. Defendant points to the only objection she raised, namely, her objection to the probation report, where she questioned the requirement for enrollment in three training programs, including anger management, child abuse, and parenting classes. It is argued that just as in *Antonio C.*, the court's response here, that defendant would be required to do each and every one of the courses if she wanted to stay out of prison, shows that further objections would have been futile because the court seemed settled on imposing each and every one of the suggested conditions of probation.

In drawing comparison to *Antonio C.*, defendant focuses on an extremely narrow excerpt of the record. It is also significant that the court in *Antonio C.* accepted the defendant's argument that objection would have been futile based on a concession by the People, and therefore had no occasion for a detailed discussion of why further objections by the defendant would have been futile. The People in this case have made no concession on this point, and in our review of the record as a whole, we find insufficient support for defendant's contention that the court would not have been receptive had further objections been made.

The trial court in *Antonio C.* offered no explanation for rejecting the defendant's objection, whereas the trial court here provided a clear and detailed explanation for rejecting defendant's objection to the probation report. When defendant objected to the requirement for enrollment in all three courses, the court explained its belief that all three courses would be a necessary supplement to serving straight time, affording defendant an "opportunity to find remorse within herself and to rehabilitate through a crash course of counseling and tools and classes that she may not be a threat to other individuals with children."

While the court did express its intent to follow all recommendations of the probation report prior to any objection being raised, it is proper to focus on the precise terms to which defense counsel objected. Before asking whether defendant accepted the terms and conditions of probation, the court stated its reasons for extending an offer of probation in the first place. The court indicated that the reason for not ordering defendant

to state prison was based on "a clear hope of rehabilitation," explaining that: "The probation that I will set, not only punishes by way of giving a time in custody, straight time, but it also has a network of counseling of child abuse classes." The court concluded: "Without those services, I believe that you would be a threat and danger to other children that might be exposed to you." Thus, the only conditions to which counsel objected appear to be the most significant of the terms the court took into account when determining that probation would be a suitable alternative to state prison.

After placing so much emphasis on the belief that rehabilitation could only be accomplished if defendant were required to complete parenting, anger management, and child abuse courses, the only objections which the court made clear it would not entertain were those affecting the counseling services provided through these courses. By contrast, the terms that defendant now challenges on this appeal were never mentioned at any point in the proceedings, though the court offered to review and read those conditions out loud. The court offered its explanation for overruling counsel's only objection, offered clarification concerning the length of the courses when asked by counsel, and never made any statements indicating that objections to terms such as those challenged on this appeal would not be entertained.

We find that the record does not support defendant's argument that any objection to her three probation conditions challenged here would have been futile, and we decline to review the challenged terms of probation on this basis.

IV. DISPOSITION

Defendant's conviction for assault in count 3 is reversed. Consequently, the two $30 fines imposed for the assault conviction pursuant to Penal Code section 1465.8 and Government Code section 70373 are also reversed. The $2,400 restitution fine imposed pursuant to Penal Code section 1202.4 is also reversed, and the matter is remanded to the trial court with directions to reconsider and recalculate the restitution fine in light of this court's reversal of the assault conviction. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P.J.

RICHLI
J.